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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 461

JOSHUA C. CARTER,

vs. *Appellant,*

GENERAL AMERICAN LIFE INSURANCE COMPANY,

Appellee

APPEAL FROM THE SUPREME COURT OF INDIANA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

Statement

Appellee has served upon appellant its typewritten copy of motion to dismiss appeal, setting forth therein five specifications to support of said motion. Appellee's motion was not accompanied by brief, and appellant begs leave to address his objections and opposition to said motion by reference to each specification as set out in appellee's typewritten motion to dismiss, and in the same order as they appear in said motion.

Address to Specification 1 of Appellee's Motion to Dismiss

Appellant would show that the records of the Supreme Court of Indiana will not show that appellee herein filed a brief in the Supreme Court of Indiana. In fact no brief was filed by appellee in the Supreme Court of Indiana other than the same brief which was filed while the cause was in the Indiana Appellate Court. This cause having been transferred to the Supreme Court of Indiana after the opinion of the Indiana Appellate Court was written and which opinion considered the appellee's assignment of errors on the merits of the case. The first Court having decided in favor of the appellant herein, and appellee having joined the issues on the merits and proceed to trial and judgment and thereafter appeal said cause to the Indiana Appellate Court where the same was briefed, not on the question of jurisdiction alone but upon the merits. Appellant therefore had no occasion to address remarks to appellee's argument in his brief for the reason that the jurisdictional question, in so far as appellant was concerned, had been by appellee waived as aforesaid. Also decided in this appellant's favor in the 1st Court. Appellant says that the federal question is not too late as set out and raised in his petition for rehearing as contended by appellee's motion, for the reason, the records show that this case presents in many respects an exception to the general rules cited by appellee, among which exceptions appellant says:

(a) The grounds of the decision of the Supreme Court of Indiana supply a new and unexpected basis for the claim asserted by this appellant, who was defeated by the denial of his federal rights.

(b) Appellant by his petition for re-hearing (see Clauses 6 & 7, Page 7 and Clauses 8 & 10, Page 8 of appellant's

printed jurisdictional statement) challenged the Constitutional validity of the ruling of the Supreme Court of Indiana, whereby Sec. 39-4704 Burns' 1940 Replacement Statute (see Page 4 of appellant's printed jurisdictional statement) is adjudged to mean one thing for some cases and another thing for others.

Great Northern Railway Company v. *Sunburst Oil & Refining Company*, 287 U. S. 358-367, 77 L. Ed. 360 (1932).

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill*, 281 U. S. 673, 678, 74 L. Ed. 1107.

Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 74 L. Ed. 870.

Address to Specification 2 of Appellee's Motion to Dismiss

It sufficiently appears from the decision of the Indiana Supreme Court that that Court at the time of passing upon and by its action in passing upon said statute considered and passed upon the following contentions of appellant; that the Statute of the State of Indiana, to-wit; 39-4704 Burns' 1940 Replacement (see appellant's printed jurisdictional statement, Page 4) abridged the privileges and immunity of appellant as a citizen of the United States in violation of the 14th amendment, by depriving him of the privileges of bringing a suit in the State of Indiana, while resident citizens, under like circumstances, are permitted to do so.

Whitfield v. *State of Ohio*, 287 U. S. 431, 441, 80 L. Ed. 778.

Home Insurance Co. v. *Dick*, 281 U. S. 397, 405, 407, 74 L. Ed. 926.

74 A.L.R. 701.

Ward Baking Co. v. *City of Fernandina*, 29 F. (2nd) 789.

Even if the federal question, whether Sec. 39-4704 Burns' 1940 Replacement is repugnant to the federal constitution has not been raised in the trial court (which appellant says it was). This Court has jurisdiction over an appeal from a decision of the Supreme Court of Indiana, the highest Court of the State of Indiana, in which the question could be raised. Because the question was treated as properly raised and was passed upon adversely to the claim of unconstitutionality.

See 27 R.C.L. 78; R.C.L. Perm. Supp. p. 5921; R.C.L. Pocket Part, title "United States Court", Sec. 82.
74 A.L.R. 701.

The cause having been briefed to the Supreme Court on the questions of merits instead of solely on the constitutional question and having been waived by appellee by its action in briefing said cause on the merits and the Appellate Court of Indiana having decided the case on the merits, appellee had no reason to anticipate, and it was at his first opportunity when he filed his petition for rehearing to invoke the protection of the federal constitution and statute. He could not have earlier assailed the objection as a violation of the constitution and laws of the United States. Again, it may not reasonably be held that the appellant was bound to anticipate that the Supreme Court would construe said statute as it finally did and by its act deprive him of his constitutional rights. Appellant was not therefore bound to anticipate such construction or in advance to invoke the federal protection against the said decision. It is clear that appellant sufficiently raised in the highest court of the State, to-wit, Indiana Supreme Court the federal question herein presented and appellant is entitled to have same considered.

Sanders v. *Shaw,* 244 U. S. 317, 320, 61 L. Ed. 1163, 1165.

Address to Specification 3 of Appellee's Motion to Dismiss

Appellant says that the Supreme Court of Indiana, by its action in the construction of the said Sec. 39-4704 Burns' 1940 Replacement Statute, fully discriminated against this appellant as a resident citizen of the State of Indiana. That the constitutionality and validity of the ruling of the Supreme Court of Indiana, in this case is such that the statute is adjudged to mean one thing for this appellant, a non-resident citizen of the ~~the United States~~ State of Indiana and another thing for citizens of Indiana (see Exhibit "B" page 19 through page 25 appellant's printed jurisdictional statement). Such a construction as this could not have been anticipated by appellant. Appellant could not have made an objection to same in advance before the Supreme Court of Indiana rendered its decision. This, therefore, brings appellant's case clearly within the well recognized exception to the general rule; that raising the question by petition for rehearing would be too late, whereas under such circumstances it is not believed by appellant to be too late, but appellant believes that the federal question is properly before this Court for consideration.

Great Northern Railway Company v. *Sunburst Oil & Refining Company*, 287 U. S. 358, 367, 77 L. Ed. 360 (1932).

Ward Baking Co. et al. v. *City of Fernandina*, 29 (2nd) 789.

Postal Tel.-Cable Co. v. *City of Newport*, 247 U. S. 464, 62 L. Ed. 1215.

Address to Specification 4 Appellant Says:

That he did not withhold pleading as set forth by appellant, but that through an honest mistake, overlooked that part of the provision of Rule 12, alleged by appellee but as

soon thereafter and at the first opportunity after appellant discovered same he complied with said rule and he took appellee's receipt, for said pleadings. The petition for appeal is found at page 53 of the records. That the assignment of errors is found at page 96 of the records. That at no time after appellee was served with the praecipe for transcript and also with a citation did he request of appellant a copy of said papers. That said papers were all filed in duplicate and were on file in the Supreme Court and could have been had if appellee had requested same. That appellee does not set out in his motion that he did not know the appeal had been granted, that he did not receive the citation, but admits he received the citation and the praecipe as provided by rules of court. Appellee complains that it was not served with an order granting the appeal. Appellant say no provisions are required whereby he is to serve appellee with a copy of the order granting the appeal, which order may be a simple endorsement on appellant's petition or it may be in separate order which was done in this case. (Page —, the records of this case.)

The Supreme Court of Indiana by its action in construing Sec. 39-4704 Burns' 1940 Replacement Statute rendered it unconstitutional as depriving appellant of the equal protection of the law in that it discriminated against appellant, particularly, as to class of action and also against appellant, without apparent reason for such distinction.

Board of Education of City of San Francisco v. *Alliance Assurance Company,* 159 F. 994.

Address to Specification 5 Appellant Says:

Appellee contends the appeal is improvidently brought and that appellant's right was by writ of certiorari. In the case appellant would show that under the United States Code Annotated title 28, Sec. 344 (c), this Court will treat

said appeal as a petition for certiorari if such is found to be appellant's rights. However, appellant further contends that the appeal is properly brought under the aforesaid United States Statute, and that his contention is properly before this Court, and it makes no difference whether the violation of federal right was by the legislature, executive department or the judiciary of the State of Indiana.

Home Insurance Co. v. *Dick,* 74 A.L.R. 701.

Conclusion

It is respectfully submitted that for the reasons set forth herein this Court has jurisdiction and that contentions of the appellant herein are properly before this Court.

Z. Dallas Hicks,
Attorney for Appellant.
Anderson, Hicks & Anderson,
Reed & Reed,
Of Counsel for Appellant.